IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-5412

JOHN R. DILLARD and WILLIE WILLIAMS, individually, and on behalf of all other persons similarly situated,

Appellants,

v.

INDUSTRIAL COMMISSION OF VIRGINIA, THOMAS M. MILLER, Chairman, Industrial Commission of Virginia, M. EDWARD EVANS, ROBERT P. JOYNER, Commissioners of the Industrial Commission of Virginia, and AETNA CASUALTY AND SURETY COMPANY,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

REPLY BRIEF FOR THE APPELLANTS

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ARGUMENT

I.

THE "DELICATE STRUCTURE" OF THE WORKMEN'S COMPENSATION SYSTEM WILL NOT BE HARMED BY PROVIDING NOTICE AND THE OPPORTUNITY FOR A HEARING

The major part of the Argument in the Brief for the Appellees, Industrial Commission of Virginia and In-

dividual Commissioners, pp. 4-6, 10 (hereinafter referred to as Brief for Commission) is the contention that Virginia's workmen's compensation system would be rent out of shape by the relief asked for by the appellants. See also, Brief for Appellee Aetna Casualty and Surety Company (hereinafter referred to as Brief for Aetna) p. 21. This argument is constructed on two suppositions, that if the relief is granted it will open the floodgates for hearings and litigation (Brief for Commission, p. 5); and, that insurers and employers would retaliate by not voluntarily paying benefits to obviously eligible workers at the inception of the process. (Brief for Commission, p. 6)

The first supposition—opening the floodgates—has been raised in procedural due process cases and has been dealt with summarily. There is no reason to believe that a worker who is not still disabled will abuse the opportunity for a hearing any more than the welfare recipient. *Goldberg v. Kelly*, 397 U.S. 254. The Commission's statement that "it would be in the employee's financial interest to request a hearing even where he knew the employer was clearly right", (Brief for Commission, p. 5), is just not correct. The worker will always be financially better off returning to work, since compensation is only 66 2/3% of his average weekly wage up to a maximum of $80.00 per week. The traditional reason for paying benefits at only a percentage of the worker's preinjury wage is to prevent the malingering and abuse about which the Appellees are so worried. A worker who has had his family income cut by 1/3 already has a great incentive to return to work. Volume I, *Supplemental Studies for The National Commission on State Workmen's Compensation Laws*, (hereinafter referred to as *Supplemental Studies*), Berkowitz, *Workmen's Compensation Income Benefits: Their Adequacy & Equity* (1973) p. 191. The maximum

benefit in Virginia in 1972 was only 78% of the 1971 poverty level, Volume I, *Supplemental Studies*, Berkowitz, *Workmen's Compensation Income Benefits: Their Adequacy & Equity* (1973) p. 204, and only 3% more than the maximum Aid to Families with Dependent Children welfare grant for a family of four. *Id.* at 206. One certainly must assume that the vast majority of workers who have in fact fully recovered from their injuries will continue to agree to voluntarily terminate their benefits and will go back to work.

An increase in hearing requests, if one materializes, would more likely be by those injured workers who are now being forced by financial pressures into a premature return to work, into lump-sum settlements of a less than a compensatory amount, or into just abandoning, out of lack of knowledge, the benefits due them.

It is odd that the Commission and Aetna have put forth the second supposition—that of employer and insurer retaliation—in that in other parts of their Briefs they point out that "there exist adequate sanctions to deter arbitrary action" (Brief for Aetna, p. 21, Brief for Commission, pp. 7, 8). It is clear that the Commission would have the power, and the duty, to correct any abuses of the system which would result from employer and insurer retaliation. See also, Section 65.1-115, Code of Virginia of 1950, as amended. (Giving the State Corporation Commission the power to revoke permits to do business in the state for violating any provisions of the Workmen's Compensation Act).

Appellants question whether this finely-tuned system which the Appellees are so concerned about having changed, is as equitable and just as they would have one believe. There are recent indications that the present system of Workmen's Compensation is not working the way it should. See generally, *The Report of the National*

Commission on State Workmen's Compensation Laws (1972), (hereinafter referred to as *National Commission Report*, and the National Workers' Compensation Standards Act of 1973 (S. 2008, 93rd Congress, 1st Session). To take just one example from the *National Commission Report* which indicates that there might be something amiss in Virginia's present workmen's compensation system, Table B.2, page 146, shows that in 1972 Virginia employers spent only .391% of their payrolls for workmen's compensation premiums. The only states in which employers paid less were Indiana, .385%, and Pennsylvania, .387%, and the average payment was almost twice as much as Virginia's (.722%).

II.

APPELLANTS DILLARD'S AND WILLIAMS' NEEDS ARE REPRESENTATIVE OF THE CLASS WHICH THEY REPRESENT

Aetna appears to concede that Dillard, Williams and their families were forced into great financial need by the suspension of their benefits, but alleges that this is not representative of the class (Brief for Aetna, p. 17).

In the most recent *Biennial Report of the Industrial Commission of Virginia* (1969-1970) the 16,348 workmen's compensation cases in 1970 were analyzed, showing the weekly wages of recipients. Table 5, page 12:

Over 13% (2233) earned less than $70 gross per week;

Over 24% (3967) earned less than $80 gross per week;

Over 35% (5768) earned less than $90 gross per week;

Over 45% (7409) earned less than $100 gross per week;

Over 54% (8896) earned less than $110 gross per week;

Over 61% (9992) earned less than $120 gross per week;

Over 68% (11,131) earned less than $130 gross per week;

Aetna raises the executive and millionaire movie star (Brief for Aetna, pp. 17, 18) as examples of those who will receive workmen's compensation. The fact that they will receive compensation does not diminish the brutal need the vast majority of injured workers suffer, which need is shown by the above statistics. The fact that a millionaire movie star may occasionally become eligible for workmen's compensation should not affect this decision any more than this Court allowed its decision in *Goldberg v. Kelly*, 397 U.S. 254 to be affected by the fact that a small number of welfare recipients might own Cadillacs. See also Volume I, *Supplemental Studies*, Price, *Three Aspects of the Relationship of Workmen's Compensation to other Public Income Maintenance Programs*, 309, 340 (1973). The fact is that the financial situations of Dillard and Williams are typical of injured workers receiving workmen's compensation benefits throughout the country. *National Commission Report* (1972) p. 62.

III.

THE CASES WHICH HAVE COME BEFORE THE COMMISSION SINCE THE AMENDMENT OF RULE 13 ARE NO DIFFERENT THAN THOSE PREVIOUSLY CITED IN APPELLANTS' BRIEF

The Brief for the Commission at page 7, footnote 7, implies that the cases which have come before the Commission since the amendment to Rule 13 are different than those discussed in Appellants' brief. The

fact is that the types of cases and issues are the same. E.g. *Ball v. Clinchfield Coal Co.*, _____ OIC ____, Claim number 226-684, October 24, 1973 (Conflicting medical opinion, benefits had been suspended for almost a year); *Royal v. Southern Industries, Inc.*, ____ OIC ____, Claim number 272-001, October, 1973 (Insufficient original medical evidence, back benefits to February 16, 1973); *Boyce v. Dodson Brothers Exterminating Co.*, ____ OIC ____, Claim number 257-731, October 17, 1973 (failure to lose weight does not constitute unjustified refusal of medical treatment, back benefits to March 24, 1973); *Thompson v. The United Dye Works*, 54 OIC 379, June 22, 1972 (Claimant's refusal of recommended surgery justified; already undergone three major surgical procedures without relief of back pain); *Moyer v. Virginia Oak Tannery, Inc.*, 54 OIC 286, September 7, 1972 (Claimant did not unjustifiably refuse offered employment). The "probable cause" determination of Amended Rule 13 has had no effect on the complex issues which have had to be reversed after an evidentiary hearing by the Commission, and after long periods during which the injured worker and his family have had to go without benefits.

> There are no easy solutions to such intricate and controversial medico–legal questions, and their determination is ultimately a matter of statutory and case law interpretation, the development of facts and the application of law to facts.

Volume III, *Supplemental Studies*, Brooke, *Administration of Workmen's Compensation Cases in California, Florida, Massachusetts, New Jersey, New York and Wisconsin* (1973) p. 92.

IV.

THE ALLEGED SURVEY OF CASES SINCE JULY 1, 1972 IS NOT PROPERLY BEFORE THIS COURT, NOR, ASSUMING ITS VALIDITY, DOES IT INDICATE THAT NOTICE AND THE OPPORTUNITY FOR A HEARING ARE UNNECESSARY

The Commission has introduced for the first time an alleged review of cases decided by the Commission since Rule 13 was amended (Brief for Commission, p. 7). Appellants' contend that such new evidence cannot be introduced at this point in the case. Appellants' have had no opportunity to test the accuracy of this "review", nor any opportunity to find out what factors were considered or not considered to determine that Rule 13 is "most effective".

Assuming, *arguendo*, that the bare statistics are correct, this does not show an effective system (Brief for Commission, p. 7). It does not, for example, factor in those injured workers who were forced to go back to work before the hearing. There are numerous opinions by the Commission which upheld the employer and insurer where the opinion merely states that the worker did not appear to defend his case. Without more than raw statistics there is no way to tell how many of the decisions used in the "review" were the result of the worker just giving up.

Probably an even larger number of workers were forced into lump-sum settlements prior to the hearing; presumably the Appellee's study shows all of their cases as having been upheld at the hearing.

A study for the National Commission on State Workmen's Compensation Laws graphically sets out the problem of forced settlements.

> But the analysis so far implies that insurer pressure can pay off in terms of a reduced settlement and,

without denying this liability, the insurer can apply pressure to the worker. For instance, he may delay payments—in some cases until the settlement is reached. Even if payments are begun, they may be cut off or the worker may be told that they will be cut off. The evidence suggests that insurers are not willing to apply such pressures.

* * * * *

Thirty percent of all the C & R [lump-sum settlements] cases reported that their payments had been cut off either because "the insurance company was trying to get them to go back to work" (10 percent) or for a variety of other reasons not specified (20 percent) but excluding final settlement, return to work, payments expired, denial of liability, or a violation by the worker. . . . Most C & R settlements ". . . were made after a period during which the worker had received no compensation and had paid for his own medical care, and hence urgently needed money to pay his debts."

* * * * *

. . . [I]t is clear that some workers may have been forced to settle because no weekly compensation payments were made during the negotiation period.

Volume III, *Supplemental Studies*, Russell, *Compromise and Release Settlements* (1973) pp. 192, 193.

The Industrial Commission tries to negate appellants' argument concerning unfavorable lump-sum settlements by pointing to the fact that it must approve the settlement (Brief for the Commission, p. 7). But there is nothing in the record to show whether the Commission gives such "settlements" more than a perfunctory review, or whether in fact the Commission has ever disapproved of a settlement which has been "agreed to" by the employee and his employer or insurer.

Another factor ignored by the "review" is the procedure used by Travelers Insurance Company in Appellant Williams' case. They sent to the Commission their request for the probable cause determination and the hearing at the same time and by the same letter that they requested Mr. Williams sign a form acknowledging that he was no longer disabled (App. 75). If it had been true that Mr. Williams was fully recovered and ready to go back to work (rather than still partially disabled as was the case) and he had signed the acknowledgment, his case would have ended up as one of the statistics where the "probable cause determination" had been upheld, since Travelers had started the hearing procedure contemporaneously with their attempt to get a "voluntary" termination.

Despite the fact that these relevant factors were ignored by this "review", it still discloses that in nearly 10% of the remaining cases the probable cause finding was reversed at a later evidentiary hearing (Brief for Commission, p. 7 n. 8), and that at least one of these injured workers had to exist for almost one year without benefits. *Ball v. Clinchfield Coal Co.*, ____ OIC ___, Claim number 226-684 (From October 13, 1972 to October 24, 1973).

V.

ADEQUATE NOTICE IS NOT GIVEN INJURED WORKERS

In *Goldberg v. Kelly*, 397 U.S. 254, 267-268, the Court set out as one of the fundamental requisites of due process "that a recipient have timely and adequate notice detailing the reasons for a proposed termination". Aetna,

conceeding as they must, that no notice is required by the statutes or the Commission, states that:

> As a matter of practice, applicants [employer or insurers] notify the claimant simultaneously with the filing of the application.

(Brief for Aetna, p. 5). They cite the documents at pages 17 and 75 of the Appendix to support their statement. First it is evident that these notifications were not "timely" since the benefits had already been cut off by the time the injured worker received them.

Moreover, the forms used by the two insurance carriers in this case clearly do not adequately inform the injured worker. In *Goldberg v. Kelly*, 397 U.S. 254, 268-269, the Court stated:

> The opportunity to be heard must be tailored to the capacities and circumstances of those who are to be heard.

For recipients of workmen's compensation the chances are almost even (49.1%) that they will have had less than four years of high school. Volume II, *Supplemental Studies*, Berkowitz, *Sources of Information About Workmen's Compensation Recipients* (1973) p. 127, Table C. The letter sent to Appellant Williams (App. 75) is, if anything, designed to confuse rather than to inform. The letter states that they are suspending benefits and requesting the Commission to hold a hearing "should one become necessary". It goes on to request Mr. Williams sign an attached form "acknowledging the termination of your temporary disability". It does not give the worker a copy of the evidence which is being submitted. It does not tell the worker that if he signs the attached form and he finds out later that he is in fact not fully recovered, he will then have the burden of proof shifted to him when he applies for a hearing.

Fundamental fairness dictates a more informative notice.

> Where employees are concerned, even more affirmative action is necessary. Workmen's compensation is a rather complicated body of law and any omission or improper act on the part of the injured worker can result in a serious curtailment of his rights. Failure to consult his employer before obtaining medical case, failure to give proper notice or to file a claim, and lack of understanding of reopening and hearing requirements often result in unnecessary hardships. There is little in the law that is more disgraceful than an injured worker being denied benefits which are rightfully his but are barred due to his oversight or lack of understanding.

Volume III, *Supplemental Studies,* Lewis, *A Workmen's Restoration System* (1973) p. 509.

VI.

AETNA IS NOT ACTING AS A PRIVATE PARTY WHEN IT SUSPENDS WORKMEN'S COMPENSATION BENEFITS

The underlying fallacy of Aetna's state action argument is their starting from the proposition that an insurance carrier or employer, within the context of the Workmen's Compensation System, is acting as a private party just as they did under common law. As shown in the Brief for the Appellants, pp. 8-13, every act of the employer and insurer in relation to the Workmen's Compensation Scheme is controlled by the laws and regulations of the State. Aetna's statement that:

> Unlike the state of California in *Reitman v. Mulky,* 387 U.S. 369 (1967), Virginia has not encouraged insurance carriers to suspend payments *or given them greater rights to do so than they had at common law.*

(Brief for Aetna, p. 14) (emphasis added) fails to mention the fact that *there was no Workmen's Compensation Scheme at common law.* Aetna's reliance on *Lindsey v. Normet,* 405 U.S. 56, which they state "more closely parallels the case with regard to the common law rights of the parties than any case cited by Appellant" (Brief of Aetna, p. 17), is for the same reason inapposite.

What Aetna seems to be arguing is that the Workmen's Compensation system is unconstitutional because it deprives employers and insurers of their freedom to act like private individuals in their relations with injured workers (Brief for Aetna, pp. 10, 11). This argument was of course answered long ago. See e.g. *Arizona Copper v. Hammer,* 250 U.S. 400. The state has imposed its Workmen's Compensation System on certain employers and all insurers can no more suspend workmen's compensation benefits without due process than they could suspend benefits for racially discriminatory reasons.

Even without Rule 13 the suspension of benefits would have been under color of state law. Aetna states that:

> Prior to the adoption of Rule 13, therefore, the insurance carrier was not acting under color of state law in terminating benefits but rather was exercising its inherent right to control its own funds, subject to subsequent review.

(Brief for Aetna, p. 15). See also, Brief for Commission, p. 9. This statement fails to take into account that Aetna, by choosing to write workmen's compensation insurance, gave up its "inherent right to control its own funds" in respect to the laws and regulations governing workmen's compensation. Aetna must prove to the state that it is handling its funds properly to insure solvency. Section 65.1-116, Code of Virginia of 1950, as amended. *Cf.* Section 65.1-104, Code of Virginia of 1950, as amended

(dealing with self-insurers). Aetna must pay compensation in the amount and in the manner the law directs. (Brief for Appellant, pp. 11-12). If Aetna does not perform in accordance with the law the state will revoke its permit to do business. Section 65.1-115, Code of Virginia of 1950, as amended. The "inherent rights" of private parties to act like private parties are given up when they chose to participate with the state as a part of the Workmen's Compensation System. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-725.

Respectfully submitted,

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